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NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1986

PAUL ALEXANDER,
CHAMPION OIL AND GAS LEASE SERVICE, INC.,
NORTH RIVER INSURANCE COMPANY,
Petitioners,

VS.

CHEVRON U.S.A.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

In 1984, the Congress of the United States amended §905(a) of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter LHWCA) to legislatively overrule the decision of this Court in *Washington Metrolpolitan Area Transit Authority v. Johnson*, 104 S.Ct. 2827, 467 U.S. 925, 81 L.Ed. 2d 768 (1984). As amended, the Act now provides that a general contractor may be deemed the employer of a subcontractor's employees (and thereby entitled to tort immunity from suits brought by such workers) only if the subcontractors fails to secure the payment of compensation as required by §904 of the Act. In this case, petitioner Paul Alexander was an employee of petitioner Champion Oil and Gas Lease Services, Inc., who was injured while working on a platform located on the Outer Continental Shelf secured payment of compensation benefits for Alexander through its insurer, North River Insurance Company. Alexander filed suit against Chevron U. S. A. and other defendants, alleging that his injuries were the result of Chevron's negligence, and Champion and North River intervened for reimbursement of compensation and medical benefits paid on the injured worker's behalf. The United States District Court or the Western District of Louisiana held that Chevron was entitled to immunity from Alexander's claims due to their status as Alexander's "borrowing employer", and the United States Court of Appeal for the Fifth Circuit affirmed. The question presented is:

Have the 1984 amendments to the Longshoremen's and Harbor Worker's Compensation Act abrogated the "borrowing employer" defense to tort suits by injured employees of subcontractors, in cases where compensation benefits are paid by the employee's direct employer?

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and NORTH RIVER INSURANCE COMPANY,
PETITIONERS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

This petition for certiorari arises out of the granting of a motion for summary judgment in favor of Chevron U. S. A., declaring that entity to be the "borrowing employer" of petitioner Paul Alexander, and therefore entitled to tort immunity from this action. The petition is filed on behalf of Paul Alexander, the injured worker; Champion Oil and Gas Lease Services, Inc., Mr. Alexander's employer; and North River Insurance Company, Champion's compensation insurer.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A., infra, 1a- *A-1a)* is reported at 806 F.2d 526. The opinion of the district court (Appendix B, infra, A-4) is not reported.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeal was rendered on November 21, 1986. This petition for certiorari is being filed within the prescribed period of 90 days after November 21, 1986. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. This case involves Sections 904 and 905(a) of Title 33, the Longshoremen's and Harbor Workers' Compensation Act, as set forth below.

> §904. Liability for compensation
> a. Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title. In the case of an employer who is subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.
> b. Compensation shall be payable irrespective of fault as a cause for the injury.
>
> §905. Exclusiveness of liability
> a. Employer liability; failure of employer to secure payment of compensation
> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependants, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an

> employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

2. These provisions are made applicable to workers such as petitioner Paul Alexander by virtue of 43 U.S.C. §1333(b) of the Outer Continental Shelf Lands Act, which provides as follows:

> Longshore and Harbor Workers' Compensation Act applicable; definitions
>
> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. §901 et seq.]. For the purpose of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section--

1. the term "employee"does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.
2. the term "employer" means an employer any or whose employees are employed in such operations; and
3. the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

STATEMENT

1. Prior to their amendment in 1984, Section 904 and 905 of the LHWCA read as follows:

> Section 904(a): Every employer shall be liable for and shall secure payment to his employees of the compensation payable under Section 907, 908 and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.
>
> Section 905(a): The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee. . . except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee. . . may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury and death.

In *Washington Metropolitan Area Transit Authority vs. Hohnson*, 104 S.Ct. 2827 (1984), the United States Supreme Court granted the general contractor immunity from tort liability to injured subcontractor employees. The Court's holding has been summarized by Professor Maraist as follows:

> In WMATA, the defendant was engaged as owner and general contractor in the construction of a rapid transit system in the District of Columbia, where the LHWCA applies to non-maritime worker-injury cliams. The defendant, for reasons probably unrelated to tort considerations, purchased LHWCA coverage for the employees of its subcontractors. When sued in tort by some of those employees injured while engaged in the construction project, WMATA urged that it was immune from tort liability. The majority of the Supreme Court sustained WMATA's contention, using the following logic: (1) WMATA was a contractor who had secured the payment of LHWCA compensation benefits to the employees of a subcontractor (through the "wrap up" policy insuring all employees of all of its subcontractors), (2) the subcontractor had not secured compensation, (3) WMATA was entitled to secure compensation before the subcontractor defaulted (and was not required to wait until after such default), and (4) the term "employer" in Section 905(a) included a general contractor. Thus WMATA, as a general contractor who had secured LHWCA compensation benefits, was an "employer" entitled to tort immunity, under Section 905(a).
>
> The majority did not confine the language of its opinion to the precise facts before it, but made these sweeping pronouncements:

> Section 4(a) simply places on general contractors a contingent obligation to secure compensation whenever a subcontractor has failed to do so. Taken together, §§4(a) and 5(a) would appeal to grant a general contractor immunity from tort suits brought by subcontractor employees unless the contractor has neglected to secure workers' compensation coverage after the subcontractor failed to do so.
>
> . . .
>
> We conclude, therefore, that §§4(a) and 5(a) of the LHWCA render a general contractor has not failed to honor its statutory duty to secure compensation for subcontractor employees when the subcontractor itself has not secured such compensation. So long as general contractors have not defaulted on this statutory obligation to secure back-up compensation for subcontractor employees, they qualify for §5(a)'s grant of immunity.

The dissent read the majority opinion as providing tort immunity to the general contractor and the subcontractor, so long as one of them secured compensation. Justice Rehnquist, writing for himself and two others, opened his dissent by observing: "The Court today takes a 1927 statute and reads into it the 'modern view' of workers' compensation, whereby both the contractor and the subcontractor receive immunity from tort suits provided somebody secures compensation for injured employees of the subcontractor." Later, the dissent quipped: "contractor such as WMATA are, thus, cast in the role of backup quarterbacks who get paid for sitting on the bench. They need to do nothing; as long as the starting quarterbacks perform, the backups receive equal benefits.

Frank L. Maraist, *Developments in the Law 1983-1984, Admiralty,* 45 La.Law Rev. 179, 190-91 (Nov. 1984)

The Congress of the United States legislatively overruled this decision in 1984. As amended, Section 904 now provides:

> In the case of an employer who is a subcontractor, *only if* such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

Also, the folowing sentence was added to the end of Section 905(a):

> *For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by Section 904 of this title.*

In summary, the Act now provides that a contractor will be considered as an "employer" and will now enjoy tort immunity *only if* the subsontractor fails to secure payment of compensation.

2. The plaintiff in this case, Paul Alexander, was hired by Champion Oil and Gas Lease Services, Inc. (Champion) and had been working for this company for approximately one year at the time of his injury in March of 1984. (T. Vol. III, p. 370)

The plaintiff sustained a severe burn injury while working as a roustabout on a fixed platform owned and operated by defendant, Chevron, located on the outer Continental Shelf off the coast of Louisiana. Paul was called to work at the beginning of each seven-day hitch by the Champion supervisor, and at the end of each hitch he turned in his time sheets to his employer, Champion. He received all his paychecks from Champion. (T Vol. III, p. 370-71)

Since Paul was the only Champion employee on the platform at the time of his injury, he received his instructions from Chevron employees. Although Chevron could request his dismissal from the platform. Chevron could not terminate his employment relationship with Champion. (T Vol. III, p. 371)

Under the terms of the service contract entered into between Champion and Chevron, Champion agreed to "furnish labor and necessary equipment to work offshore as assigned in the West Cameron Area and Vermillion Group for the year 1984 or until cancelled". The Contractor's Agreement further provides, in pertinent part:

> Contractor agrees to furnish all labor, tools equipment and to secure permits necessary for complete performance of the work unless otherwise provided for herein, . . . *Contractor agrees to . . . obtain and maintain in effect Workmen's Compensation Insurance,* as prescribed or permitted by law, and adequate Employer's Liability Insurance. *Contractor agrees to perform the work as an independant contractor and not as an employee of Company. (emphasis added)*

T. Vol. III, p. 336-37.

In accordance with the terms of this agreement, Champion secured workmen's compensation insurance. Paul has received compensation and medical benefits since his injury, which have been paid by North River, Champion's compensation insurer. T. Vo. III, p. 371; Vol. I, p. 80

3. On August 17, 1984, Paul Alexander filed suit in the Thirty-Eighth Judicial District Court for the Parish of Cameron against Chevron U.S.A., Inc., for injuries sustained on an offshore drilling platform owned and operated by Chevron located on the Outer Continental Shelf off the coast of Louisiana on March 31, 1984. The action was timely removed to the United States District Court for the Western District of Louisiana, alleging jurisdiction based on diversity of citizenship and an amount in controversy in excess of $10,000.00 (28 U.S.C. 1332) The plaintiff's employer, Champion Oil and Gas Lease Services, Inc. and Champion's compensation insurer, North River Insurance Company, intervened in the lawsuit, seeking reimbursement for compensation payments and medical benefits paid to Mr. Alexander. Various other defendants have been added to the lawsuit, but are not concerned with the issues now before the Court.

Chevron filed a motion for summary judgment on October 2, 1985, claiming that Paul Alexander was their borrowed servant and, therefore, Chevron was immune from tort liability to him. The Motion for Summary Judgment was granted by the lower court's ruling of March 5, 1986.

In his opinion, the district judge found that the facts of the case indicated the existence of a borrowing employer/employee relationship as between Alexander and

Chevron and that the contractual provisions of the work order between Champion and Chevron were insufficient to negate the existence of such relationship.

As to the plaintiff's contention that the "borrowed servant" defence had been abolished by the 1984 amendments to the LHWCA, the court was constrained to following the ruling of the Fifth Circuit Court of Appeals in *Doucet vs. Gulf Oil Corporation,* 783 F.2d 518 (5th Cir. 1986). The district judge indicated his agreement with the concurring opinion of Judge Tate in *West vs. Kerr-McGee Corp.*, 765 F.2d 526, 533, which was consistent with the holdings of the Fifth Circuit in *Weathersby vs. Conoco Oil Co.*, 752 F.2d 953, 958 (5th Cir. 1984) and *Martin vs. Ingalls Shipbuilding, Div. of Litton Systems, Inc.,* 746 F.2d 231, 232 (5th Cir. 1984). Judge Tate concluded that the 1984 amendments "make plain that (section 905(a)) statutory immunity had never been intended to be conferred unless the contractor himself was liable for compensation benefits under the Act," *West,* supra at 533. Nonetheless, the district judge felt bound to apply the "fixed law of the circuit" as enunciated by Judge Rubin in the Doucet case. 783 F.2d at 522-23.

The district court's ruling was certified as a final judgment pursuant to Federal Rule of Civil Procedure 54(b), and Alexander, Champion and North River invoked the appellate jurisdiction of the Fifth Circuit Court of Appeal and the appeals were consolidated. Alexander applied for an original hearing en banc, which was denied. The Fifth Circuit, relying on *Doucet*, supra, affirmed the district court, and Alexander and Champion now petition this court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This case presents an issue of vital importance not only to workers injured in the hazardous occupation of offshore oil production, but also to their subcontractor/employers. As a result of the Fifth Circuit's holding, the worker loses his right to compensation for his injury from the party responsible therefor, and his employer loses his concomitant right to reimbursement of compensation and medical benefits paid the injured worker.

The 1984 amendments to the Longshoremen's and Harbor Worker's Compensation Act (LHWCA) have, by specific and unequivocal language, abolished the "borrowing employer" defense to tort claims by the employees of subcontractors, since the amendments provide that only the payment of compensation will insulate the defendant from tort liability.

Since 1959, these provisions had consistently been interpreted as permitting a tort suit by the injured employee of a subcontractor against a general contractor, as long as compensation had been provided by the subcontractor. See, for example, *Pure Oil Co. vs. Snipe,* 293 F.2d 60 (5th Cir. 1961), holding (at page 68) that

> (T)he provisions of §905 prescribing that the Longshoremen's Act is the exclusive liability of the employer does not operate for the benefit of anyone else and certainly not for a third party.

Immunity for the general contractor was also rejected in such cases as *Bertrand vs. Forest Corp.,* 441 F.2d 890, 811 n.2 (5th Cir. 1971); *Probst vs. Southern Stevedoring Co.,* 379 F.2d 763, 766, 767 (5th Cir. 1967)

(characterizing the duty of the general contractor to secure compensation for the sub-contractor's employees as a secondary, protective one, and noting "only the employer. . . can get under the immunity umbrella of 905"); *DiNicola vs. George Hyman Construction Co.*, 407 A.2d 670 (D.C. Cir. 1979); *Thomas vs. George Hyman Construction Co.*, 173 F.Supp. 381 (D.D.C. 1959).

While allowing the tort suit against the general contractor in Probst, the court left open the question of whether the general contractor would be given immunity if that entity was actually required to pay compensation to the injured worker. Even though the general contractor had secured LHWCA benefits, immunity was denied in *Perry vs. Baltimore Contractor, Inc.*, 202 So.2d 694 (La.App. 1st Cir. 1967) and *Fiore vs. Royal Painting Co.*, 398 So.2d 863 (Fla. Dist. Ct. App. 1981).

Since amendment of the Act, the Fifth Circuit has adhered to this rule in *Martin vs. Ingalls Shipbuilding, Div. of Litton Sys.*, 746 F.2d 231 (5th Cir. 1984) and *Trussel vs. Litton Systems, Inc.*, 753 F.2d 366 (5th Cir. 1984). Both cases held that since the subcontractor had provided compensation to the injured employee, the contractor had no immunity from a state tort claim by the worker. In the recent case of *Weathersby vs. Conoco Oil Co.*, 752 F.2d 953 (5th Cir. 1984), the court held:

> Because the subcontractor, National, provided coverage to Weathersby, the language of the 1984 amendment clearly precludes Conoco (the contractor) from assuming "employer" status for the purpose of claiming §905 immunity. 752 F.2d at 958, n.3.

See also *Doucet vs. Atlantic Richfield Co.*, 753 F.2d 1074 (5th Cir. 1985) (per curiam), cert. denied, 105 S.Ct. 2705 (1985); *Moser vs. Aminoil, U.S.A., Inc.*,618 F.Supp 774 (D.C.La. 1985); *Allen vs. United States*, 625 F.Supp.841 (D.D.C. 1986), *Frederick vs. Mobil Oil Corp.*, 765 F.2d 442 (5th Cir. 1985). Retroactive amendment has been held to be constitutional. *Louviere vs. Marathon Oil Co.*, 755 F.2d 428, 430 (5th Cir. 1985).

This brings our discussion to the cases of *West vs. Kerr-McGee Corporation*, 765 F.2d 526 (5th Cir. 1985) and *Doucet vs. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir. 1986). The plaintiff in *West* sued the platform owner/operator for damages sustained in an on-the-job injury. The Trial court granted Kerr-McGee's motion for summary judgment, holding that the defendant was West's borrowing employer. But the Fifth Circuit reversed, holding that summary judgment was improvidently granted in view of the contract negating borrowing employer status. The issue of the impact of the 1984 amendments on the borrowing employer defense was not briefed by the parties, but was raised by the court sua sponte during oral argument. (765 F.2d at 528, 535).

Nonetheless, the plurality opinion (in dicta) expressed the view that this defense remained viable.

Addressing this issue, the court noted (at 765 F.2d 529-30):

> The bare language of the amendment to §905(a) could also be interpreted as foreclosing any designation of any contractor as the employer of its subcontractors' employees-even if a borrowed-employee relationship existed-unless

> the subcontractor failed to secure compensation payments. If Congress meant for §905(a) to be so read, the cases delineating indices of a borrowed employee would be obsolete. In actions such as this one, where the subcontractor paid LHWCA benefits, the general contractor would have no immunity as a matter of law.

Finding, however, that the statute contained "latent ambiguities" despite its "superficial clarity", the Court referred to the statute's legislative history and concluded that Congress intended to preserve this defense despite the plain language of the amendment.

Judge Tate concurred in the reversal of summary judgment, but disagreed with the conclusion that the borrowed servant doctrine contained to be valid subsequent to the 1984 amendment.

As Judge Tate pointed out, the fallacy of the majority opinion lies in its resort to the legislative history, or lack thereof, when the intent of Congress is clearly set forth by the unambiguous terms of the statute itself. 756 F.2d at 533, citing *Consumer Product Safety Commission vs. GTE Sylvania, Inc.*, 447 U.S. 102, 108, S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

> The statutory language is explicit, and it makes functional sense: only where an employer is liable for the compensation remedy provided by the Act is that remedy made exclusive against him for the employee's injuries. It makes no functional sense to hold that a contractor, immune under the Act from compensation remedy for injuries received by a subcontractor's employees, is nevertheless also entitled to tort immunity

because of the exclusive nature of the compensation remedy accorded, not at all against the contractor, but solely against the subcontractor. It is statutorily irrelevant under the Act's compensation scheme that, for third-party tort purposes, the subcontractor's employee may be a "borrowed servant" of the contractor for whose torts the contractor may be liable.

Id.

* * *

Under the pre-1984 wording of Sections 904(a) and 905(a) of the Act, there may have been room for a construction that the general contractor might be immune from tort suit by a subcontractor's employee if the latter was a "borrowed employee", or, at least, the Supreme Court apparently so found, in its decision that was immediately and retroactively overruled by the Congress as contrary to the legislative intent and statutory scheme of the Act. Whatever merit there may have been to the "borrowed servant" tort immunity judicially granted to that contractor-albeit, without judicial analysis of the Act or reasoned judicial explanation for the immunity-has disappeared with the 1984 clarification of language as above noted. The specific addition of the concluding sentence of §905(a), 33 U.S.C. §905(a)(1984) (quoted at note 1 supra) states that, with regard to the exclusive liability of an "*employer*" from the compensation remedy provided by the Act, "a contractor shall be deemed the *employer* of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation."
(Emphasis added.) 534-35

Following the *West* case, this court rendered its opinion in *Doucet vs. Gulf Oil Corp.*, supra. Again, as in *West*, the judgment for the defendant was reversed on other grounds, but the court held, relying on *West*, that the defendant would be allowed to assert the borrowed servant defense at retrial.

The effect of a finding that a worker is a borrowed servant is two-fold:

1. The borrowing employer is responsible for providing compensation to a worker injured in an on-the-job accident, to the exclusion of the worker's payroll employer.

2. The borrowing employer becomes immune from tort liability to the injured worker, because the borrowing employer is *no longer considered a third party.*

As Judge Rubin notes is *Doucet*, the borrowing employer is "shielded *by the exclusivity of the compensation remedy* from tort liability" (783 F.2d at 522) recognizing that the benefit of immunity is bestowed only in exchange for the added burden of compensation liability. But under the 1984 amendments, Chevron would *never* be liable for compensation to Paul Alexander, *regardless of the amount of control exerted over his activities*, unless Champion failed to provide these benefits. It could never be argued that, despite the plain language of the amendments, Chevron would be liable for compensation to the plaintiff when these benefits have already been provided by Champion. If Chevron is liable for compensation only upon the default of Champion to furnish benefits, then Chevron should receive tort immunity *only under the same circumstances. The two concepts-tort immunity and compensation liability-are inextricably linked.* To reward Chevron

with tort immunity although they have not paid compensation to the plaintiff is a violation of the principle of quid pro quo, which is the basis of workers' compensation schemes. 2A A. Larson.
The Law of Workmen's Compensation, §65.11 (1983)

The purpose of the amendments was to prevent the invocation of immunity by negligent parties who are also able to avoid the payment of compensation to the injured worker. The WMATA case would have allowed this result, and *so does the borrowed servant defense.* Only through elimination of this inequitable defense will the party who is actually at fault bear the burden of compensating the injured worker. Otherwise, the burden will fall upon the subcontractor, (to provide a portion of the injured worker's lost wages and medical benefits) and the employee himself (who gives up his remaining lost wages, plus compensation for pain and suffering). Only if this defense is eliminated will oil companies such as Chevron be provided with incentive to reduce hazards in the workplace. Only if this defense is eliminated will justice be served.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
JONES, JONES & ALEXANDER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 19th day of February, 1987, served a copy of the foregoing pleading on all counsel to this proceeding by mailing same by United States mail, properly addressed and first class postage prepaid, from Cameron, Louisiana.

JENNIFER JONES BERCIER

APENDIX A

Paul ALEXANDER, Plaintiff-Appellant,

v.

CHEVRON, U.S.A., Defendant-Appellee.

Paul ALEXANDER, Plaintiff,

v.

CHEVRON, U.S.A., Defendant-Appellee,

v.

CHAMPION OIL AND GAS LEASE SERVICE, INC. and North River Insurance Company, Intervenors-Appellants.

Nos. 86-4214, 86-4271
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Nov. 21, 1986.

Employee sued company to recover damages for injuries he suffered in fire and explosion on company's stationary production platform while employed by labor service contractor. The United States District Court for the Western District of Louisiana, Earl E. Veron, J., granted company summary judgment and employee appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that terms of contract between company and labor service contractor did not purport to prohibit company from becoming borrowing employer of contractors' payroll employees, so that under test of *Ruiz* employee was borrowed servant.

Affirmed.

Appeals from the United States District Court for the Western District of Louisiana.

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Alexander sued Chevron U.S.A., Inc. (Chevron) to recover damages for injuries he suffered in a fire and explosion on Chevron's stationary production platform in the Gulf of Mexico off the Louisiana coast. Champion Oil and Gas Lease Service, Inc. (Champion) and North River Insurance Company (North River) intervened seeking to recoup benefits paid to Alexander pursuant to the Longshore and Harbor Workers' Compensation Act (LHWCA). The district court, 623 F.Supp. 1462, granted Chevron's motion for summary judgment and dismissed Alexander's suit and the intervention of Champion and North River on grounds that Alexander was Chevron's borrowed employee and Chevron was shielded from the tort action by LHWCA. We find no error and affirm.

I.

Alexander was hired by Champion, a labor service contractor, approximately a year before his accident. During the entire term of Alexander's employment with Champion, he was assigned exclusively to Chevron platforms. Alexander worked seven days on and seven days off. At the beginning of each seven day hitch, Alexander reported to Champion's office, and was assigned to a Chevron platform. Chevron then transported Alexander to his assigned platform either by helicopter or vessel.

While he was aboard the platform Alexander performed whatever manual labor the Chevron supervisor directed him to do. He worked alongside Chevron laborers or roustabouts as they are called in the oilfields. All tools and equipment, except for his boots, hat and gloves were provided by Chevron. While on board the platform Alexander ate, slept and lived with the Chevron employees. He received the same training as the Chevron roustabouts and attended the same safety meetings. On some jobs several Champion roustabouts accompained Alexander; on the date of the accident, however, Alexander was the only Champion roustabout aboard Chevron's East Cameron 245 platform.

At the end of each working day, Alexander filled in his time sheet and the Chevron supervisor verified his hours. After the conclusion of the work week, Alexander delivered the time sheet to Champion which issued his paycheck.

Under the terms of the service contract between Champion and Chevron, Champion agreed to furnish labor, equipment, and "to perform the work as an independant contractor and not as an employee of Company...."

On appeal, appellants argue that the district court erred in concluding: (1) that he was Chevron's borrowed empoyee; and (2) that the 1984 amendments to the LHWCA, 33 U.S.C. §§ 904(a) and 905(b) preclude the application of the "borrowed employee" doctrine in this case.

II.

A.

[1] In *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 312-13 (5th Cir. 1969), we established nine factors or indices of employment for the factfinder to consider in determining whether a general employee of one had become the borrowed employee of another. The district court considered these factors and concluded that the summary judgment evidenced established that Alexander was the borrowed employee of Chevron. Alexander's only serious disagreement with the district court's conclusion is that the contract between Champion and Chevron precludes a finding that he is Chevron's borrowed employee. The pertinent portion of the contract provides:

> Contractor agrees to perform the work as an independant contractor and not as an employee of Company; to indemnify and hold Company harmless from and against claims or liens of workmen and materialman; to defend at its own expense any and all suits or actions; and to pay any judgments against Company arising out of the alleged infringement of patent rights occasioned by performance of servants hereunder.

Alexander cites two recent cases by this circuit in support of his argument that the contract precludes entry of summary judgment on the borrowed employee issue: *West v. Kerr-McGee Corp.*, 765 F.2d 526 (5th Cir.1985); *Alday v. Patterson Truck Lines, Inc.*, 750 F.2d 375 (5th Cir.1985).

Alexander's reliance on *Alday* and *West* is misplaced. In those cases the contract explicitly prohibited application of the borrowed employee doctrine. In *Alday*, the contract provided: "Under no circumstances shall an

employee of a CONTRACTOR be deemed an employee of COMPANY; neither shall CONTRACTOR act as an agent or employee of COMPANY." In *West* the contract provided:

> Neither contractor nor any person used or employed by contractor shall be deemed for any purpose to be the employee, agent, servant, or representative of Kerr-McGee in performance of any work of services ... under this agreement.

In contrast to the language of the contracts in *Alday and West,* the language in the Champion-Chevron contract, relied on by Alexander, does not purport to prohibit Chevron from becoming the borrowing employer of Champion's payroll employees.

Also, the terms of the contract between the borrowing employer and payroll employer basis to deny summary judgment when the remaining *Ruiz* factors point toward borrowed servant status. *See Gaudet v. Exxon Corp.,* 562 F.2d 351, 358 (5th Cir.1979). We found no error in the district court's determination that Alexander was Chevron's borrowed employee.

B.

[2,3] Alexander also asks us to reconsider our recent rejection of the argument that the 1984 amendments to § 905(a) of the LHWCA precludes a finding that a subcontractor's employee is the borrowed employee of a contractor. *Capps V. N.L. Baroid Industries, Inc.,* 784 F.2d 615 (5th Cir.1986); *Doucet v. Gulf Oil Corp.,* 783 F.2d 518 (5th Cir. 1986); *West v. Kerr McGee Corp.,* 765 F.2d 526 (5th Cir. 1985). We decline the invitation; in this circuit one

panel may not overrule the holding of a previous panel. *United States v. Albert*, 675 F.2d 712, 713 (5th Cir. 1982).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

		Filed March 5, 1986
PAUL ALEXANDER	:	CIVIL
	:	ACTION
VS.	:	NO.
	:	84-2398
CHEVRON USA, ET AL	:	

RULING ON MOTION OF DEFENDANT, CHEVRON USA, FOR SUMMARY JUDGMENT

This matter comes before the Court upon the motion of the defendant, Chevron USA, Inc. for summary judgment to enter on its behalf on the grounds that the undisputed facts establish that, at the time of his injury, the plaintiff Paul Alexander was a "borrowed employee" of Chevron USA and that Chevron USA thus is entitled to tort immunity under the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 905(a). After considering the undisputed facts and the recently articulated law of the Fifth Circuit regarding the issues involved herein, the Court finds the defendant's argument to be meritorious.

In ruling on a motion for summary judgment, the Court must view the evidence in a light most favorable to the party opposing the motion and determine that no genuine issue of material fact exists and that the moving party entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c). In the case at bar, the following facts are undisputed.

The plaintiff, Paul Alexander, was injured on March 31, 1984 as a result of an explosion and fire which occurred on Chevron's East Cameron 245 offshore production platform. The plaintiff was nominally employed at the time by Champion Oil and Gas Lease Services, Inc., a general labor service contractor, and had been assigned to work on Chevron platforms for more than the past year. On the date of the accident, plaintiff was the only Champion payroll employee working on Chevron's platform and, as in the past, plaintiff's work was directed, supervised, and controlled by Chevron's employees. As is apparent from the plaintiff's deposition, the work he performed on Chevron's platform as a roustabout was no different than the work routinely performed by those roustabouts directly employed by Chevron. At the time of his accident, plaintiff was working alongside Chevron employees who were performing the same tasks as plaintiff.

Furthermore, Chevron trained the plaintiff for the various roustabout services he performed on Chevron platforms and plaintiff regularly attended Chevron's safety meetings. Plaintiff regulary received no safety training from Champion. All tools and equipment utilized by the plaintiff in performing his roustabout tasks were owned and provided by Chevron. None was provided by Champion.

The plaintiff's work schedule was "seven and seven," meaning that he worked for seven days on a Chevron platform and then had seven days off. At the beginning of each seven day hitch, the plaintiff would report to Champion's office and was advised as to which Chevron job location he would be working for the next week. These were the only instructions which plaintiff would receive from Champion.

Chevron provided the plaintiff with transportation to and from the offshore platform and plaintiff ate, slept, and lived on the platform along with Chevron employees during his seven day hitch.

At the end of each working day, plaintiff would show his timesheet to his Chevron supervisor, who would certify the same. At the end of his seven day stint, plaintiff would turn in all of his timesheets to the Champion office and would subsequently receive his paycheck from Champion. While Chevron had the right to terminate the plaintiff's services for Chevron, it did not have the right to terminate the plaintiff's nominal employment with Champion. Under the terms of the service contract entered into between Champion and Chevron, Champion agreed to "furnish labor and necessary equipment to work offshore as assigned in the West Cameron area and Vermilion Group for the year 1984 or until concelled." The agreement further provides:

> Contractor agrees to furnish all labor, tools, equipment and to secure permits necessary for complete performance of the work unless otherwise provided for herein, ... Contractor agrees to ... obtain and maintain in effect Workmen's Compensation Insurance, as prescribed or permitted by law, and adequate Employer's Liability Insurance. Contractor agrees to perform the work as an independant contractor and not as an employee of Company.

In determining whether these undisputed facts are sufficient to establish that the plaintiff was a "borrowed employee" of Chevron as a matter of law, the following factors are to be considered:

(1) Who has control over the employee and the work he is performing ...?

(2) Whose work is being performed?

(3) Was there an agreement ... between the original and borrowing employer?

(4) Did the employee acquiesce in the new work situation?

(5) Did the original employer terminate his relationship with the employee?

(6) Who furnished tools and place for performance?

(7) Was the new employment over a considerable length of time?

(8) Who had the right to discharge the employee?

(9) Who had the obligation to pay the employee?

Alday v. Patterson Truck Line, Inc. 750 F.2d 375, 376 (5th Cir. 1985).

While these considerations are significant in the Court's consideration of the issue presented, "neither control nor any other single answer to the inquiries 'is decisive, and no fixed test is used to determine the existence of a borrowed-servant relationship'." *West v. Kerr-McGee Corp.*, 765 F.2d 526, 531 (5th Cir. 1985), citing *Alday, supra* at 376. However, in *Hebron v. Union Oil Co. of California*, 634 F.2d 245 (5th Cir. 1981), the Fifth Circuit stated that "[t]he central question in borrowed servant cases is whether someone has the power to control and direct another person in the performance of his work." *Id.* at 247; *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 312 (5th Cir. 1969). Certinaly, Chevron exercised such control in the case at bar and no Champion supervisory personel[stet] nor any other Champion employee was present on the platform. The other factors set forth above likewise point to the existence of borrowed servant relationship between plaintiff and Chevron. It is

undisputed that it was Chevron's work being performed, pursuant to an agreement between the original and the borrowing employer, in which the plaintiff clearly acquiesced. The plaintiff had worked on Chevron platforms for over a year and was working on the Chevron platform at the time of the accident pursuant to an agreement which called for Champion to provide laborers on such a platform throughout the duration of 1984.

The contract in effect between Chevron and Champion nevertheless provides that "[Champion] agrees to perform the work as an independent contractor and not as an employee of [Chevron]." The Fifth Circuit has recognized, however, that such a contractual provision may be negated by the existence of other factors than the contract, especially where the employment with the borrowing employer is of such duration that the employees can reasonably be presumed to have evaluated the risks of the work situation and acquiesced thereto. *Gaudet v. Exxon Corp.*, 562 F.2d 351, 357 (5th Cir. 1977). In the case at bar, the duration of plaintiff's employment on Chevron platforms is sufficient to overcome the contractual provision which, unlike that considered by the Fifth Circuit in *Alday*, did not contain express language such that "[u]nder no circumstance shall an employee of CONTRACTOR be deemed an employee of COMPANY." *Alday, supra* at 377. During his lengthy employment with Chevron, plaintiff received all directions, instructions, and supervision from Chevron employees, and he performed exactly the same duties as Chevron roustabouts. Similarly, the Court does not find that the borrowed employee relationship is sufficiently negated by the fact that plaintiff turned in his timesheets (which had been certified by a Chevron employee) to Champion and because he received his paychecks from Champion

in light of the totality of circumstances. Considering all the factors set forth in *Alday* and *Ruiz* set forth above, and giving no undue weight to any factor in particular, this Court is convinced that the plaintiff worked for Chevron on its East Cameron 245 platform as a borrowed employee as a matter of law.

All of the parties to this action agree that the provisions of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 901 et seq., apply to the case at bar, as the Court's jurisdiction is based on the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. Because Chevron assumed such control over the activities of the plaintiff as to make plaintiff its borrowed employee, Chevron is therefore shielded by the exclusivity of the compensation remedy from tort liability. *See Doucet v. Gulf Oil Corp.*, * F.2d * (5th Cir. 1986) No. 84-3612, slip op. at 3412 (Feb. 20, 1986); *see also West v. Kerr-McGee Corp., supra* at 528, 530.

While the LHWCA makes every employer liable for compensation regardless of fault, it further provides that such liability "shall be exclusive and in place of all other liability of" the employer to the employee. 33 U.S.C.. §§ 904(a), (b), 905(a). Pursuant to the 1984 amendments to the LHWCA, section 904(a) now provides that a contractor such as Chevron, who employs a subcontractor such as Champion, is liable for compensation "only if such subcontractor fails to secure the payment of compensation." Moreover, section 905(a) now also provides:

> For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payments of compensation as required by section 904 of this title.

Despite this provision, a contractor like Chevron may yet be deemed the employer of the subcontractor Champion's employee pursuant to the borrowed servant doctrine, even through Champion secured the payment of plaintiff's compensation. The Fifth Circuit Court of Appeals has interpreted this latter provision as follows:

> [T]he "shall be deemed" language of the 905(a) amendment refers only to "deeming" a contractor the employer of a subcontractor's employee when the contractor is not the employee's true employer as well. Under this view, if the contractor *is* the employee's "employer" under the borrowed servant doctrine, the contractor is liable for § 904(a) compensation, and has § 905(a) immunity, whether or not its behavior as a general contractor and insurance guarantor would cause it to be "deemed" an employer under the amended scheme. *West, supra* at 530.

The recent rulings in the *West* and *Doucet* cases firmly establish that the 1984 amendments to the LHWCA did not abolish the borrowed servant defense by implication or otherwise.

> The legislative history of the 1984 amendments unambiguously demonstrates that Congress' *sole* purpose in amending §904(a) and §905(a) was to overrule [*Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984], and not to amend the borrowed-servant doctrine or otherwise modify LHWCA law. *West, supra* at 530, *cited in Doucet, supra* slip op. at 3413.

Plaintiff nevertheless argues that these decisions are directly contrary to the Fifth Circuit law set forth in

Weathersby v. Conoco Oil Co., 752 F.2d 953, 958 (5th Cir. 1984) and *Maritn v. Ingalls Shipbuilding, Div. of Litton Systems, Inc.*, 746 F.2d 231, 232 (5th Cir. 1984), and that Chevron is statutorily precluded from reaping the benefit of section 905(a) because all compensation benefits have been provided by Champion. As the *per curiam* opinion in *Weathersby* stated: "Because the subcontractor ... provided coverage to Weathersby, the language of the 1984 amendment clearly precludes Conoco from assuming 'employer' status for the purpose of claiming §905 immunity." Similarly, in *Martin, supra,* another *per curiam* opinion, the Fifth Circuit found that where the sub-contractor had paid compensation to its employee, "[the contractor] is not the [employee's] statutory under the LHWCA and is therefore not entitled to immunity from suit under section 905(a) of the Act." *Id.* at 232. While admitting that these decisions of the Fifth Circuit Court are definitely inconsistent with *West* and *Doucet,* they may nevertheless be distinguished on the basis that the borrowed servant defense was not at issue in either *Weathersby* or *Martin.* Although this Court may find the analysis of Judge Tate in the *West* case, which is consistent with both *Weathersby* and *Martin,* to be particularly persuasive in its scholarly analysis that the 1984 amendments "make plain that [section 905(a)] statutory immunity had never been intended to be conferred unless the contractor himself was liable for compensation benefits under the Act," *West, supra* at 533 (Tate, J., concurring), it nevertheless feels bound to apply the "fixed law of the circuit" as pronounced by Judge Rubin in *Doucet:*

> This circuit has consistently held that, if an oil company assumes so much control over the activities of a person who is nominally the employee of the company's subcontractor as to make that

> person in effect its borrowed employee, the company is shielded by the exclusivity of the compensation remedy from tort liability.
> *Id.*, slip. op. at 3413.

Finding that the facts unequivocally establish that the plaintiff was the borrowed employee of Chevron, Chevron is thus entitled to be shielded from tort immunity under section 905(a). *See id.* Chevron's motion for summary judgment is therefore GRANTED.

THUS DONE AND SIGNED at Lake Charles, Louisiana, this 5th day of March, 1986.

/s/ Earl E. Vernon

EARL E. VERNON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Filed March 5, 1986

PAUL ALEXANDER	:	CIVIL
	:	ACTION
VS.	:	NO.
	:	84-2398
CHEVRON USA, ET AL	:	

J U D G M E N T

For written reasons assigned this date,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, CHEVRON USA, granting its motion for summary judgment against the plaintiff's suit at plaintiff's cost.

THUS DONE AND SIGNED at Lake Charles, Louisiana, this 5th day of March, 1986.

/s/ Earl E. Veron

Earl E. Vernon
UNITED STATES DISTRICT JUDGE

Judgment entered 3/6/86

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Filed March 10, 1986

PAUL ALEXANDER	:	CIVIL
	:	ACTION
VS.	:	NO.
	:	84-2398
CHEVRON USA, ET AL	:	

SUPPLEMENTAL ORDER

In connection with the motion for summary judgment filed by defendant CHEVRON USA, the Court hereby finds:

1. That on March 5, 1986, a judgment was rendered by this Court in this cause as follows:

"IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, CHEVRON USA, granting its motion for summary judgment against the plaintiff, PAUL ALEXANDER, dismissing plaintiff's suit at plaintiff's cost."

2.. That this is a multiple claims action, more than one claim for relief being presented therein and that in the aforesaid order, the Court did not make the express determination or finding that there is no just reason for delay and entering final judgment in favor of CHEVRON USA pursuant to the provisions of Rule 54(b) of the Federal Rules of Civil Procedure.

WHEREFORE, IT IS HEREBY ORDERED that the said Judgment of this Court of March 5, 1986, in this suit be and the same is hereby revised by the adoption by this Court of the findings set forth above, and the incorporation of the same into the said Judgment of March 5, 1986 and

IT IS FURTHER ORDERED that judgment be and the same is hereby entered granting the motion for summary judgment filed by defendant CHEVRON USA and dismissing the claim of the plaintiff PAUL ALEXANDER as against that defendant only, reserving the right of the plaintiff to proceed against the remaining defendants, HYDRIL COMPANY, SOLAR TURBINES, INC., JOHN H. CARTER CO., INC. and T.K. VALVE & MANUFACTURING COMPANY, and certifying that there is no just reason for delay in directing a final judgment as to defendant CHEVRON USA in this matter, while the rights and liabilities of the plaintiff PAUL ALEXANDER and the remain defendants remain for adjudication, therefore

IT IS THEREFORE ORDERED pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that the judgment of this Court dated March 5, 1986 is final judgment in this action as to defendant CHEVRON USA and plaintiff PAUL ALEXANDER.

Thus done and signed this **10th** day of **March**, 1986, at Lake Charles, Louisiana.

/s/ Earl E. Veron

Earl E. Veron, DISTRICT JUDGE

Judgment entered 3/13/86

All the parties to this Application, are listed in the caption of this case.

NO. 86-1480

In the Supreme Court of the United States

OCTOBER TERM, 1986

PAUL ALEXANDER,

Petitioner

VS.

CHEVRON U.S.A. INC.

Respondent

VS.

CHAMPION OIL AND GAS LEASE SERVICE, INC.
and
NORTH RIVER INSURANCE COMPANY,

Petitioner

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION BRIEF OF RESPONDENT, CHEVRON U.S.A. INC.

OF COUNSEL:

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26 pp

QUESTIONS RESTATED

Should this Court review the Fifth Circuit's determination, uncontradicted by any United States Circuit Court's decision or by this Court, that the long standing "borrowed employee" doctrine survived and was unaffected by the 1984 amendments to 33 U.S.C. 904(a) and 905(a) of the Longshore and Harbor Workers' Compensation Act?

On October 6, 1986, in *Capps v. N. L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986), this Court refused to grant a writ to review the Fifth Circuit's determination of this very issue.

LIST OF PARTIES PURSUANT TO RULE 28.1

1. Petitioners - Paul Alexander, Champion Oil and Gas Lease Services, Inc., and North River Insurance Company.

2. Respondent - Chevron U.S.A. Inc., parent company - Chevron Corporation; affiliated companies - AMAX, Inc., Austamax Resources Limited, Australian Consolidated Minerals N.L., Botswana RST Limited, Canada Tungsten Mining Corporation Limited, Canamax Resources, Inc., Canyon Reef Carriers, Inc., Felix Oil Company, Fresnillo Companies, Gulf Oil Finance N.V., Long Beach Oil Development Company, NOVA, an Alberta Corporation, Rosario Mexico S.A. de C.V., UNC Incorporated, Chevron Investment Management Company, Chevron Capital N.V., Chevron Capital U.S.A. Inc., Chevron Oil Finance Company.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986
NO. 86-1480

PAUL ALEXANDER,
Petitioner

VERSUS

CHEVRON U.S.A. INC.,
Respondent

CHAMPION OIL AND GAS LEASE SERVICE, INC.
and
NORTH RIVER INSURANCE COMPANY,
Petitioners

OPPOSITION BRIEF OF RESPONDENT, CHEVRON U.S.A. INC.

Respondent, Chevron U.S.A. Inc., respectfully prays that this Court decline to grant the writ of certiorari sought by petitioner to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on November 21, 1986. On October 6, 1986, in *Capps v. N. L. Baroid-NL Industries, Inc.* 784 F. 2d 615 (5th Cir. 1986), *cert. denied,* 107 S.Ct. 141, 93 L.Ed.2d 83 (1986), this Court denied a petition for a writ of certiorari to review the identical issue presented in the instant petition, as well as the Fifth Circuit's resolution of that issue. The rule of *Capps* was followed by the Fifth Circuit in the instant case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals reported at 806 F.2d 526 (5th Cir. 1986), the unpublished ruling of the district court on Chevron U.S.A. Inc.'s Motion

for Summary Judgment, as well as the district court's judgment, and supplemental order of Rule 54(b) certification of final judgment comprise the appendix to petitioner's brief.

STATUTES INVOLVED

The statutes involved are 33 U.S.C. 904(a) and 905(a), incorporated herein as Appendix A.

STATEMENT OF THE CASE

Paul Alexander, petitioner, brought this personal injury suit in the United States District Court for the Western District of Louisiana based upon the jurisdictional grant contained in the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, as well as the Federal Question Jurisdiction of this Court, 28 U.S.C. 1331. Mr. Alexander was a temporary laborer nominally employed by Champion Oil and Gas Lease Service, Inc., a business which provides laborers to oil companies in need of supplementary workers. Mr. Alexander was assigned to work for Chevron U.S.A. Inc. on its East Cameron Block 245 oil and gas production platform located on the Outer Continental Shelf, off the coast of Louisiana. He claimed that during the course of his employment with Chevron, on March 31, 1984, he suffered personal injuries, and filed the instant lawsuit to recover damages therefor. Thereafter, Champion Oil and Gas Lease Service, Inc. and North River Insurance Company intervened into the lawsuit to recover compensation benefits and medical expenses they had paid to Mr. Alexander pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*

The district court granted Chevron's Motion for Summary Judgment on the grounds that Mr. Alexander was a borrowed employee of Chevron whose exclusive

remedy as against Chevron was compensation pursuant to the Longshore and Harbor Workers' Act (LHWCA), and thus Mr. Alexander, as well as Champion and its insurer, North niver Insurance Company, were barred from any tort recovery as against Chevron. The United States Court of Appeals for the Fifth Circuit, following its settled jurisprudence, affirmed the district court's judgment.

REASONS FOR DENYING WRIT

The petition fails to state any reason for granting certiorari. Petitioners have shown no conflict among the decisions of the circuit courts, no conflict within the decisions of this Court, no important question of federal law, and certainly no unusual departure from the normal course of judicial proceedings. Sup.Ct. c . 7. Further, there is absolutely no conflict in the decisions of the Fifth Circuit regarding the continued vitality of the borrowed servant defense. See *Capps v. N. L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986); *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir. 1986); *West v. Kerr-McGee Corporation*, 765 F.2d 526 (5th Cir. 1985); and the instant case reported at 806 F.2d 526 (5th Cir. 1986).

Petitioners ask this Court to interpret 33 U.S.C. 905(a) of the LHWCA in such a fashion as to abrogate the "borrowed servant/borrowed employee" defense. Petitioners ask this Court to ignore the legislative history of 905(a) and likewise to forget the fact that this Court has recently denied a petition for writ of certiorari on the identical issue. *Capps, supra.* Petitioners' application raises no important question of federal law and is contrary to the established rules of statutory construction.

I. THE FIFTH CIRCUIT CORRECTLY FOLLOWED SETTLED JURISPRUDENCE ESTABLISHING UNEQUIVOCALLY THAT THE LONGSHORE AND HARBOR WORKERS COMPENSATION ACT AMENDMENTS OF 1984 DID NOT ABOLISH THE BORROWED SERVANT DEFENSE

The borrowed servant defense arises in cases where a defendant who is not a plaintiff's nominal employer shows that in fact the plaintiff is acting as the defendant's employee with the result that the employee's exclusive remedy against the defendant is for compensation benefits under the LHWCA 33 U.S.C. §901 *et seq.*[1] This defense, which arises from the reverse application of the doctrine of respondeat superior, has been thoroughly ingrained in the jurisprudence both prior to, and following the LHWCA 1984 Amendments. *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969); *Champagne v. Penrod Drilling Co.*, 341 F.Supp. 1282 (W.D.La. 1971), *aff'd*, 459 F.2d 1042 (5th Cir. 1972); *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. den.*, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed. 2d 414 (1978); *Hebron v. Union Oil Company of California*, 634 F.2d 245 (5th Cir. 1981). *West v. Kerr McGee Corp.*, 765 F.2d 526 (5th Cir. 1985; *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir. 1986); *Capps v. N. L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. den.*, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986).

Following the 1984 amendment to the LHWCA, Pub.L. No. 98-426, 98 Stat. 1639 (1984), 33 U.S.C. 904(a) and 905 (a) read as follows:

---

[1] 33 U.S.C. 905(a) before 1984 read in pertinent part:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee.

904(a) "Every employer shall be liable for and secure the payment of compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor."

905(a) "The liability of an employer prescribed in §904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . For purposes of this subsection a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by §904 of this title."

The word employer in both 904 and 905 has been interpreted to include not only direct employers but also borrowing employers who exercise control over the actions of another's nominal employees as if they were the direct employees of the borrowing employer. Because there is in fact an employment relationship between the borrowing employer and the borrowed employee, all of the legal effects flow from the relationship, including, for example, borrowing employer liability for the torts the employee might commit within the scope of his employment. One of those legal effects is the tort immunity set forth in 33 U.S.C. 905(a). E.g., *Ruiz v. Shell Oil Company,* 413 F.2d 310 (5th Cir. 1969); *Raymond v. I/S Caribia,* 626 F.2d 203 (1st Cir. 1980); *Huff v. Marine Tank Testing Corporation,* 631 F.2d 1140 (4th Cir. 1980); *Hebron v. Union Oil Company of California,* 634 F.2d 245 (5th Cir. 1981). *West v.*

Kerr McGee Corp., 765 F.2d F.2d 526 (5th Cir. 1985); *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir. 1986); *Capps v. N. L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. den.*, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986).

The rationale for this borrowed servant doctrine is contained in the seminal case of *Standard Oil Company v. Anderson*, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909), where an injured longshoreman sought recovery in tort from a winch operator with whom his direct employer had assigned him to work.

The question presented was whether a winch operator was the borrowed servant of another thereby abrogating any tort liability in the winch operator's nominal employer for the winch operator's actions. In discussing the test of borrowed servant status and the legal effects thereof, the Supreme Court stated:

> One may be in the general service of another, and nevertheless, with respect to particular work, may be transferred with his own consent or acquiescence, to the service of a third person, *so that he becomes the servant of that person with all the legal consequences of the new relation.* 212 U.S. at 220, 29 S.Ct. at 253, 53 L.Ed. at 483. (Emphasis added.)

The borrowed servant doctrine has been ingrained in the jurisprudence of this Court. *Standard Oil, supra; Kelley v. Southern Pacific Company*, 419 U.S. 318, 95 S.Ct. 472, 42 L.Ed.2d 498 (1974); *Baker v. Texas and Pacific Railway Co.*, 359 U.S. 227, 79 S.Ct. 664 (1959). Petitioner has cited no cases which are in conflict with this jurisprudence or even discuss or question the continued vitality of the borrowed servant doctrine. Rather, he asks the Court to find that the 1984 amendments to 33 U.S.C. 904(a) and 905(a) were meant to legislatively eliminate the borrowed

employee doctrine and defense. The basis for this novel suggestion is the last sentence contained in 905(a), added by Publ L. 98-426, 98 Stat. 1639 (1984):

> For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employee only if the subcontractor fails to secure the payment of compensation as required by 904 of this title.

Petitioner argument has been squarely rejected by the Fifth Circuit below in this case and by three other panels of the Fifth Circuit in *West*, 765 F.2d 526 (5th Cir. 1985)' *Doucet*, . 3 F.2d 518 (5th Cir. 1986); and, *Capps*, 784 F.2d 615 (5th Cir. 1986), *cert. den.*, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986). This Court, by denying a petition for writ of certiorari in *Capps*, squarely refused to question the Fifth Circuit's resolution of this issue.

Petitioner's argument is not supported by the language of the amendment, which is directed solely at contractors (and not borrowing employers) and is contradicted by the legislative history of the amendment. Petitioner fails to comprehend the distinction between the tort immunity accorded "borrowing employers" and the tort immunity previously accorded contractors who subcontracted their work and thereby were statutorily bound under 33 U.S.C. 904 to guarantee the payment of compensation to employees of their subcontractors. The language of the amendment clearly addressed itself only to the latter situation.

A defendant/employer who is not the direct employer of the plaintiff can obtain immunity from tort liability under either of two separate circumstances. First, a defendant can establish that the plaintiff was in fact acting as the defendant's employee, and was thus a borrowed employee. Second, a general contractor can assert

immunity from tort suit by the employee of a subcontractor "not because the plaintiff was a "borrowing" or *de facto* employee of the general contractor, but because of the general contractor's obligation under the pre-1984 LHWCA to guarantee the payment of compensation to subcontractor's employees. See, 33 U.S.C. 904(a) (1976)." *West, supra*, 765 F.2d at 529.

In *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984); reh. den. 468 U.S. 1226, 105 S.Ct.26, 82 L.Ed. 2d 919 (1984), this Court recognized that, in the second situation only (statutory guarantor), the majority position of the federal courts was that a contractor had no immunity unless the subcontractor failed to secure compensation and the general contractor was forced to pay it. 104 S.Ct. at 2835, 81 L.Ed. 2d at 779. *WMATA* overturned that majority position, holding that general contractors were entitled to immunity from tort liability unless they failed to meet their statutory obligation under §904(a) to secure compensation when the subcontractor failed to do so. 104 S.Ct. at 2835, 81 L.Ed. 2d at 781. *WMATA* did not in anyway address or discuss the borrowed servant defense.

The amendment to §905(a) upon which petitioner relies was enacted three months following the WMATA decision. The report of the Conference Committee unambiguously declares that *WMATA*:

> "... changed key components of what had widely been regarded as the proper rules governing contractor and subcontractor liability under the [LHWCA] . . . WMATA, the conferees believe does not comport with the legislative intent of the act, nor its interpretation from 1927 through 1983. The case should not have any precedential effect." H.R. Conf. Rep. No. 98-1027, 98 Cong., 2nd Session 24, Reprinted in 1984 U.S. Code Cong. and Admin. News 2734, 2771, 2774.

The Committee Comments make no reference to the immunity accorded to employees pursuant to the borrowed employee doctrine. The express intent of the legislature was to overrule *WMATA* as an unwanted deviation from 56 years of precedent. As the Fifth Circuit recognized in *West*, the years of precedent include the borrowed employee doctrine as well as the general-contractor rule rejected by *WMATA*. The Committee Comments show that Congress intended to do no more than restore the state of the law as it existed prior to *WMATA*, including the borrowed servant doctrine.

In holding that the 1984 amendments did not abrogate the borrowed servant defense, the *West* court stated:

> *. . .The legislative history of the 1984 amendments unambiguously demonstrates that Congress's sole purpose in amending §904(a) and §905(a) was to overrule WMATA, and not to amend the borrowed-servant doctrine or otherwise modify LHWCA law.* The report of the Conference Committee that added the §904(a) and §905(a) amendments states that *WMATA* "changed key components of what had widely been regarded as the proper rules governing contractor and subcontractor liability under the [LHWCA]," and recites that the amendments "disapprove[e]" *WMATA*. After describing the amendments, the report concludes:
>
> *WMATA, the conferees believe, does not comport with the legislative intent of the Act nor its interpretation from 1927 through 1983. The case should not have any precedential effect.*
>
> *H.R.Conf.Rep. No. 98-1027, 98th Cong., 2d Sess. 24, reprinted in* 1984 U.S. Code Cong. & Admin. News 2734, 2771, 2774.

> The narrow Congressional focus on reversing *WMATA* is underscored by the Conference Committee's beginning and ending sentences. Congress characterized *WMATA* as an unwanted deviation from 56 years of precedent. That precedent includes the borrowed-employee doctrine, *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), as well as the general-contractor rule rejected by *WMATA*, *Probst v. Southern Stevedoring Co.*, 379 F.2d 763 (5th Cir. 1967). Indeed, this court has explicity recognized that *Probst*, whose rule is codified in the 1984 amendments, does not foreclose the possibility that a general contractor may be an employer under the borrowed-servant doctrine. *Champagne v. Penrod Drilling Co.*, 462 F.2d 1372 (5th Cir. 1972), *cert. denied*, 409 U.S. 1113, 93 S.Ct. 927, 34 L.Ed.2d 696 (1973). The committee language shows that Congress intended to do more than restore the understanding that existed at the time of *Ruiz*, *Probst*, and Champagne. We conclude that the 1984 amendments have no bearing on the borrowed-employee issue before us.

765 F.2d at p. 529-530. (Emphasis added.)

In *Doucet, supra*, the Fifth Circuit, once again rejected the argument that the LHWCA amendments abrogated the borrowed servant defense, holding:

> We hold that an oil company subject to the Longshoreman and Harbor Worker's Compensation Act may invoke the borrowed-employee doctrine in defense of a tort claim by a worker nominally employed by a labor-services contractor.

783 F.2d at p. 520.

The argument was again advanced that under the amended provision of 33 U.S.C. 905(a), the borrowed servant defense had been eliminated and the only way an oil company could avail itself of the tort immunity set forth in

this provision was if the oil company was actually called upon to make compensation payments to the injured employee in accordance with 33 U.S.C. 904(a). In rejecting the argument, the Court stated:

> This circuit has consistently held that, if an oil campany assumes so much control over the activities of a person who is nominally the employee of the company's subcontractor as to make that person in effect its borrowed employee, the company is shielded by the exclusivity of the compensation remedy from tort liability. *This was not based on a specific provision of the Compensation Act but stemmed from a reverse application of the respondent superior rule, the rule that an employer is responsible not only for the acts of those persons on his payroll but for the acts of those over whom he has such control that they are in effect his borrowed servants. Thus a rule designed to impose tort liability on a person in control of an employee, albeit a borrowed one, became a defense against tort liability to the controlled employee.*
>
> *The 1984 amendments did not abolish this defense by implication. . . .*

783 F.2d at 522 (emphasis added).

The argument was again rejected by the Fifth Circuit in *Capps,* 784 F2.d at p. 619, just as it was in the instant case.

The availability of the borrowed servant defense to a borrowing employer does not arise out of the fact that the borrowing employer has in fact made compensation payments to an injured worker in accordance with 33 U.S.C. 905(a). Rather, the defense arises out of the nature of the work relationship between the borrowing employer and the worker, the fact that the worker is acting as the employee of the borrowing employer, and therefore the legal effects of the employment relationship flow

therefrom. A borrowing employer is responsible to a third party for the tortious behavior of the borrowed employee. This is one of the legal effects of the relationship. The borrowing employer is burdened with this tort liability as *de jure* employer of the worker, and in return he receives the benefit of the exclusive remedy provisions of 33 U.S.C. 905. This *quid pro quo* was neither addressed in *WMATA*, nor addressed or precluded by the 1984 LHWCA amendments. The continued vitality of this defense is unquestioned.[2]

II. THE FIFTH CIRCUIT'S OPINION IS IN COMPLETE ACCORD WITH THE PRIOR DECISIONS OF THIS COURT

There is no decision of any court in conflict with the Fifth Circuit's determination in the instant case that the borrowed employee doctrine survived and was unaffected by the 1984 amendments to the LHWCA. In fact, the only four courts considering the issue concluded that this is a correct statement of the law. *West, supra, Doucet, supra, Capps, supra* and *Alexander, supra.* (see F.N. 2 above.)

The Fifth Circuit's construction of 33 U.S.C. 905(a) as amended by the 1984 amendments is in complete accord with the decisions of this Court regarding statutory interpretation. The sole purpose of the amendment of 33 U.S.C. 905(a) was to abrogate the statutory-guarantor defense of *WMATA*; it did not in anyway have as its purpose the

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[2] Parenthetically, it should be noted that appellants have cited three cases, apparently for the proposition that the 1984 amendments to the LHWCA abrogated the borrowed servant defense. *Martin v. Ingalls Shipbuilding, Division of Litton Systems, Inc.*, 746 F.2d 231 (5th Cir. 1984); *Trussell v. Litton Systems, Inc.*, 753 F.2d 366 (5th Cir. 1984); and *Weathersby v. Conoco Oil Co.*, 752 F.2d 953 (5th Cir. 1984). Not one of these cases even mentions, let alone discusses or questions the existence of borrowed servant defense. There discussions are limited to the "statutory guarantor" immunity of the *WMATA* case, and the abrogation of that immunity by the 1984 amendments.

abrogation of the borrowed servant doctrine. The legislative history of the amendments, referenced above, makes this abundantly clear. It is absolutely proper, that a Court construing a statute, review the legislative history to ascertain its meaning.

In *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976), this Court held that to the extent the court of appeals rejected reference to the Federal Water Pollution Control Act's legislative history in discerning the meaning of the statute, the court was in error, for "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." 48 L.Ed.2d at 434. Similarly, in *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 104 S.Ct. 597, 78 L.Ed.2d 420 (1984), this Court expressly recognized that when dealing with complex statutes, the true meaning of a single section of the statute, however precise its language, cannot be ascertained if considered apart from related sections or isolated from the history of the legislation of which it is an integral part.

As this Court stated in *Watt v. State of Alaska*, 451 U.S. 259, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981):

> . . . "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (POWELL, J, concurring). See Rubin v. United States*, 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981). But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1976); *United States v. American Trucking Assns., Inc.*, 310 U.S. 534,

> 543-544, 60 S.Ct. 1059, 1063-1064, 84 L.Ed. 1345 (1940). This is because the plain-meaning rule is "rather axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand Co. v. United States,* 278 U.S. 41, 48, 49 S.Ct. 52, 54, 73 L.Ed. 170 (1928) (Holmes, J.). *The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of Common meaning to have their literal effect. E.G., Church of the Holy Trinity v. United States,* 143 U.S. 457, 459, 36 L.Ed. 226 (1892); *United States v. Ryan,* 284 U.S. 167, 175, 52 S.Ct. 65, 68, 76 L.Ed. 224 (1931).

101 S.Ct. at 1677-1678 (Emphasis added.)

The legislative history shows without question that the sole purpose of the 1984 amendment to 33 U.S.C. 904(a) and 905(a) was to legislatively overrule *WMATA,* and nothing else. It did not in anyway abrogate, address or effect the borrowed servant defense. Petitioners' argument ignores this Court's decision in *WMATA, supra,* as well as the legislative history of the 1984 amendments. Petitioners' argument is frivolous and not worthy of review by this Court. Review of the identical argument was refused by this Court in *Capps v. N. L. Baroid-NL Industries, Inc.,* 784 F.2d 615 (5th Cir. 1986), *cert. den.,* 107 S.Ct. 141 (1986), 93 L.Ed.2d 83.

CONCLUSION

Petitioner seeks a writ of certiorari to review the determination by the Fifth Circuit below that the 1984 amendments to the LHWCA, particularly 33 U.S.C. 904(a) and 905(a), did not affect the continued vitality and existence of the borrowed employer defense. A cursory review of the statutes' language and legislative history confirms

that the Fifth Circuit's decision below was the correct one. Moreover, the only courts which have considered the issue have reached the identical conclusion. *West, supra, Doucet, supra, Capps, supra.* There is no conflict within the Fifth Circuit or within any circuit with respect to the issue before the Court.

Respondent respectfully urges that this Court deny the writ of certiorari requested by petitioner to review the decision of the Fifth Circuit Court of Appeals entered in this case on November 21, 1986.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that copies of the foregoing opposition have been served on:

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by United States mail, first class, postage prepaid, this 27th day of May, 1987.

George B. Jurgens III

GEORGE B. JURGENS III

APPENDIX

33 U.S.S. §904. Liability for compensation.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause of the injury.

33 U.S.C.. §905 Exclusiveness of liability.

(a) Employer liability; failure of employer to secure payment of compensation. The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury of death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the

> injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumes the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title. . .

Prior to the amendments of the LHWCA, Pub. L. No.98-426, 98 Stat. 1639, 1641 (1984), 33 U.S.C. §§904 (a) and 905(a) read:

33 U.S.C. §904. Liability for compensation.

(a) Every employer shall be liable for and secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

§905. Exclusiveness of liability.

(a) Employer liability; failure of employer to secure payment of compensation:

Employer liability; failure of employer to secure payment of compensation. The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on accout of such injury or death. In such action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumes the risk of his employment, or that the injury was due to the contributory negligence of the employee.